IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 19/09/2003

Coram

The Honourable Mr. Justice P. SHANMUGAM
and
The Honourable Mr. Justice T.V. MASILAMANI

Criminal Appeal No.1219 of 2003

R.R. Gopal @ Nakkeeran Gopal .. Appellant

-vs-

State represented by
the Inspector of Police,
CB CID, Coimbatore. .. Respondent

Prayer: Appeal against the Order dated 4.8.2003 passed by the learned Special Judge under the Prevention of Terrorism Act, 2002, Chennai in Crl. M.P. No.52 of 2003 and to release the appellant on bail in Crime No.1 of 2003 on the file of the Deputy Superintendent of Police, CB CID Head Quarters, Chennai-1.

!For Appellant : Mr. N. Natarajan,
Senior Counsel
for Mr. N. Elango.

^For Respondent : Mr. N.R. Chandran,
Advocate General assisted by
Mr. C. Manishankar,
Special Public Prosecutor and
Mr. I. Subramaniam,
Public Prosecutor.

:J U D G M E N T

P. SHANMUGAM, J.

This is an appeal preferred under Section 34(4) of the Prevention Of Terrorism Act, 2002 and Section 439 of the Code of Criminal Procedure as against the order refusing to grant bail to the appellant under Section 49(7) of the said Act and to release the appellant on bail in Crime No.1 of 2003 on the file of the Deputy Superintendent of Police, CB CID Head

Quarters, Chennai-1.

2. The appellant/petitioner is said to have been arrested in Crime No.414 of 2001 of Sathymangalam Police Station on 11.4.2003. Based on the alleged search and recovery of arms found in his possession, a case was registered against him in Crime No.1 of 2003 on the file of the Inspector of Police, CB CID Head Quarters for an offence under Section 25(1B)(a) of the Arms Act, 1959 and Section 124(A) of the Indian Penal Code. Thereafter, on 16.4.2003, the provisions of Section 4(a) of POTA were invoked and the crime was altered into one under the Prevention Of Terrorism Act in Crime No.1 of 2003 on the file of the respondent. The petitioner is on remand.

3. Petitioner filed Criminal Miscellaneous Petition No.52 of 2003 in F.I.R. (POTA) No.5 of 2003 before the Special Court constituted under the Prevention of Terrorism Act, 2002, Poonamallee under Section 49 of the said

Act for an order of bail. The learned Judge, by his order dated 4.8.2003, dismissed the application and the present appeal is against this order and for an order to release him on bail.

4. Mr. N. Natarajan, learned senior counsel appearing on behalf of the appellant submitted that there are grounds for believing that the appellant is not guilty of having committed the said offence and therefore, the appellant, who is already in jail for 180 days, is entitled for grant of bail. According to him, the appellant was not in possession of any arms or ammunitions specified so as to be held guilty under the Terrorism Act. The documents furnished to him would clearly establish that he could not have been in possession of the specified arms and ammunitions. Secondly, it is submitted that there could not have been a recovery based on his voluntary statement said to have been taken on 25.4.2003 in the light of his categorical statements and objections. According to the learned senior counsel, it is highly improbable to accept the recoveries said to have been made only to incarcerate him on some pretext or the other. He, therefore, prays that the appellant has made out a prima facie case for believing that he is not guilty of having committed the offence charged against him and hence be released on bail.

5. Learned Advocate General, the Special Public Prosecutor as well as the Public Prosecutor also made their submissions. According to them, the burden is on the appellant to prove that he is not guilty of the offence and that it is premature to go into the question of discrepancy as to the arms recovered and the statements obtained. It is submitted that the appellant, who has obtained a stay before the Supreme Court, is the cause for the prosecution in not filing the final report and proceeding with the trial and therefore, he cannot take advantage of it to seek for an order of bail. It is also submitted that the arms or ammunitions specified under the Arms Rules have been recovered in a notified area, which would be sufficient to hold that the appellant is guilty of having indulged in terrorist activities. According to them, the submission that there was no voluntary statement is a matter of evidence and the Court cannot act on the self-serving hypothesis of the appellant. It is submitted that the appellant had failed to establish that he

is not guilty of committing the offence. According to them, the recovery of arms specified under Section 4 of POTA is sufficient to hold that the appellant is guilty of the offence and if there is any discrepancy in the type of arms recovered, it is for the trial court to go into that question and the said question cannot be gone into at this stage and therefore, requested the Court to dismiss the appeal and reject the relief of bail.

6. We have heard the counsel and considered the matter carefully.

7. The Prevention of Terrorism Act, 2002 is an Act enacted for the purpose of preventing and dealing with terrorist activities. A ' terrorist act' has been defined as commission of an act set out under Section 3(1) of the Act. Section 4 of the Act says that a person shall be held guilty of a terrorist act if he is in unauthorized possession of any arms or ammunitions specified in a notified area. There is a presumption as to the offence under Section 3 of the Act on recovery and as per Section 49(7) of the Act, a person accused of the offence cannot be released on bail until the court is satisfied that there are grounds for believing that he is not guilty of having committed such an offence. From the above, it is clear that stringent provisions are made under the Act to deal with terrorist activities. The general rule of criminal law is that the intent and the act must both concur in order to constitute a crime (actus non facit reum, nisi mens sit rea). The POTA is so framed as to make an act criminal, whether there has been any intention or otherwise to do a wrong or not. The ordinary criminal law presumes innocence of the accused until the guilt is proved beyond doubt. The onus normally lies on the prosecution to prove the ingredients in order to establish the charge. Whereas, under the present Act, presumption of an offence is established if arms are recovered from the possession of the accused in a notified area and there is reason to believe that such arms were used in commission of such offence. Therefore, it is necessary that these provisions are to be strictly construed.

8. A Constitution Bench of the Supreme Court, in Sanjay Dutt vs. State, C.B.I., Bombay-2 [1994 S.C.C. (Cri.) 1433], while dealing with a similar provision, viz. Section 5 of the Terrorist And Disruptive Activities (Prevention) Act, 1997, has held that the significance of unauthorized possession of any arms and ammunitions, etc. in a notified area is that a statutory presumption arises that the weapon was meant to be used for a terrorist or disruptive act. This is so because of the proneness of the area to terrorist and disruptive acts, the lethal and hazardous nature of the weapon and its unauthorized possession with this awareness within a notified area. Their lordships, in paragraph 26 of the judgment, have observed as follows :-

"For constituting the offence made punishable under Section 5 of the TADA, the prosecution has to prove the aforesaid three ingredients. Once the prosecution has proved the 'unauthorized, conscious possession' of any of the specified arms and ammunitions, etc. within a notified area by the accused, conviction follows on the strength of the presumption unless the accused proves the non-existence of a fact essential to constitute any of the ingredients of the offence. Undoubtedly, the accused can set up a defence of

non-existence of a fact which is an ingredient of an offence to be proved by the prosecution." (emphasis added)

Therefore, it is open to the accused to prove that he is not in unauthorized possession of any arms or ammunitions.

9. In Narcotic Control Bureau vs. Kishan Lal [A.I.R. 1991 S.C. 558], the Supreme Court held that the power of the High Court to grant bail under Section 439, Cr.P.C. is subject to the limitations contained in the Special Act. Section 37 of the N.D.P.S. Act contained similar wordings that there must be reasonable grounds for believing that the accused is not guilty of such an offence. In Usman Bhai Dawood Bhai Memmon & Others vs. State of Gujarat [A.I.R. 1988 S.C. 1922], while considering the grant of bail by a Designated Court, their lordships of the Supreme Court have held that they should not act mechanically, but should examine every case carefully since before granting bail, the Court is called upon to satisfy itself that there are reasonable grounds for believing that the accused is innocent of the offence and that he is not likely to commit any offence while on bail.

10. A Division Bench of this Court, in Pazha Nedumaran & 4 Others vs. State represented by the Deputy Superintendent of Police & Others [2003 (2) C.T.C. 210], while considering Section 49 of POTA, held that the language suggests that where the Public Prosecutor opposes the bail application, such accused should not be released on bail until the Court is satisfied that there are grounds for believing that he is innocent. The Division Bench has observed as follows :-

"The plain meaning would be that instead of showing that there is no prima facie case against him for his conviction, the accused would have to show that there is prima facie case for his acquittal."

11. The appellant in this case was intimated of his arrest by the Inspector of Police through a Telegram dated 12.4.2003 addressed to the Manager, Nakkeeran Magazine to the effect that the appellant was arrested near the Nakkeeran Office on 11.4.2003 at about 2040 hours in connection with Sathyamangalam Police Station C.T. No.414 of 2001 u/s. Man Missing (A) to 147 148, 302 and 201, I.P.C. read with Section 25 (1-B)(a) of the Arms Act by SIC CICID Police and was taken to CICID Office. In the telegram, it is further stated, which is relevant for our purpose, as follows :-

"On search, since it was found that he was in possession of an unlicensed revolver with ammunition and a pamphlet in support of TNLA, a case in CICID HQRS CR. No.1/2003 u/s 25(1-B)(A) Arms Act, 1959 and 124 -A IPC was registered and also he was arrested in this case."

In the First Information Report dated 12.4.2003 filed by the Inspector of Police, CB CID Head Quarters, Chennai before the Sessions Court for Exclusive Trial of Bomb Blast Cases & POTA Cases,Chennai at Poonamallee, it is stated as follows:-

"As soon as he was brought, a search was made and it was found out that R.R. Gopal was found in possession of an unlicensed Country Made Pistol with ammunition and a Pamphlet supporting TNLA, a banned Organization, in a black handbag. Hence, the following properties, viz. 1) Unlicensed Country Made Pistol with Ammunition and 2) Pamphlet supporting TNLA and ID Card and other visiting cards, etc. from his possession were seized."

The Deputy Superintendent of Police, on 12.4.2003, in his alteration report submitted before the Additional Chief Metropolitan Magistrate, Egmore, has stated that the accused was arrested in connection with Sathyamangalam Police Station Crime No.414 of 2 001 on 11.4.2003 and when his person was searched, a country made Gun with two live muskets of 410 and a booklet in support of TNLA were seized under a cover of mahazar.

12. From the above, it could be seen that three different versions are given by the prosecution as to the type of weapon recovered from the appellant. They are :

(a) An unlicensed Revolver with ammunition and a pamphlet;
(b) An unlicensed country made Pistol with ammunition and a pamphlet; and
(c) A country made Gun along with two live ammunition of 410 muskets and a booklet in support of TNLA.

It is obvious that all of these three versions cannot be correct. A revolver is different from a pistol. Similarly, a gun will be different from a revolver and a pistol. Besides, an unlicensed revolver is different from an unlicensed country made pistol. Above all, both the revolver and the pistol would be entirely different from a country made gun with two live ammunition of 410 muskets. Here again, the 4 10 muskets could not go along with the gun, pistol or a revolver. When the possession of an unauthorized arm itself is an offence, the prosecution cannot hold a person guilty of a terrorist act without proving the possession of a particular arm or ammunition. The documents furnished by the prosecution themselves are contradicting. In other words, they are prevaricating with reference to the nature of the arms recovered. The authorities who have dealt with the matter are not ordinary officers, but they are in the ranks of an Inspector of Police and a Deputy Superintendent of Police. There cannot be any difference of opinion that police officers, especially those in the above ranks dealing with offences of this nature, are fully aware of the nature and type of weapon recovered. The Court cannot permit a mistake of this nature at the hands of police officials. Similarly, the omission to mention about the two live ammunition of 410 muskets and the mentioning of the booklet instead of pamphlet in a black handbag cannot be a mere mistake.

13. In the light of these contradictions, we find prima facie that the weapon could not have been in the possession of the appellant or recovered from him. Therefore, no legal presumption can be drawn so as to hold that the prosecution has proved the offence as defined under Section 3 of the Indian Evidence Act. The term 'proved' as defined under Section 3 of the Indian Evidence Act means that after considering the matter before it, when the Court

either believes a particular fact to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon a supposition that it exists. Similarly, a fact is said to be ' disproved' when after considering the matters before it, the Court either believes that it does not exist or considers its existence so improbable that a prudent man ought, under the circumstances of the particular case, to act upon a supposition that it exists. Applying the above principles, in this case, we are of the view that prima facie, the non-existence of the recovery is so probable that we can act upon the supposition that the recovery does not exist.

14. Insofar as the recovery under Section 25 of the Act dated 25.4.2 003 is concerned, it is seen that on 21.4.2003, when the CB CID sought for police custody of the appellant, he has categorically stated before the learned Judge that he was not willing to go to the custody of police since the very same officer had already enquired him ten days earlier and that he had already given all the information to him. The appellant further stated that the present case was being foisted and that there was nothing to inform the police. According to him, there was every possibility that the police would torture him, get his signature and in the name of raid, they will be able to show recovery and he had already intimated the High Court that his security was in danger. In his elaborate statement before the learned Judge dated 21.4.2003, the appellant has stated that the police have planned to take his custody in any one of the cases and to record recovery of crores of rupees and some arms from him in some place of the forest or outside. On 22.4.2003, he had made a statement before the Court that if his custody was granted with the police, they will plant incriminating documents and articles in his printing press, his office and also the residence of his relatives and his employees and record recovery of the same through him. In the light of these categorical objections setting out in detail, the attitude of the police towards the appellant and the possibility of their planting a recovery and foisting a case against him, it is highly improbable that the appellant would have made a voluntary statement confessing the receipt of arms, ammunitions and explosives and thereupon led the police to the places for discovery of the incriminating materials and that a recovery would have been made on the basis of such voluntary statement on 25.4.2003. In this context also, we have to hold that it is very difficult to believe the same as probable and that under the circumstances of the case, the appellant would have made such a statement and the recovery made on that basis.

15. It is the specific case of the appellant right through that the respondent is acting with an ulterior motive. A learned single Judge of this Court, in his order in Crl. O.P. No.24771 of 2001 dated 10.1 2.2001 in reference to an application filed by the appellant under Section 438, C.R.P. for an anticipatory bail in Crime No.90 of 2000, has found as follows :-

"In the facts and circumstances revealed from the pleadings and the arguments by the parties in the case in hand, there is absolutely no sign of the designs of the respondents in the scheme of the events revealed, but since the apprehension of the petitioner is alarming and since regarding the said apprehension expressed on the part of the petitioner the prosecution is

silent, this Court is of the firm view that the petitioner's apprehension of arrest at the hands of the respondents, under some pretext or other, is quite reasonable and thus becoming entitled to be afforded with the protection of Section 438 of Cr.P.C."

Similarly, another learned single Judge of this Court, in his order in Crl. O.P. Nos.4254 and 4255 of 2003 dated 5.3.2003 for an anticipatory bail in Crime Nos.676 and 1500 of 1998, has held as follows :-

"The learned senior counsel for the petitioner contended that the petitioner has shown malafides on the part of the respondent by placing all materials and the petitioner has also shown that the accusation appears to stem from ulterior motive to humiliate the petitioner by having him arrested and hence he is entitled for anticipatory bail in the cases as per the decision of the Apex Court in Gurubaksh Singh vs. State of Punjab (AIR 1980 S.C. 1632). The allegation of malafides cannot be gone into in detail, since the cases are under further investigation. Still, it is true that the petitioner has placed enough materials before the Court to show that there was friction between the petitioner and the police machinery for a long time." (emphasis addded)

In the light of these observations coupled with the reasons set out in paragraphs 5 and 6 of the Memorandum of Grounds, the submissions made on behalf of the appellant cannot be said to be without any substance.

16. It has to be pointed out that though the Sessions Court referred to the submissions made on behalf of the petitioner/appellant, the Court was of the view that it is premature to consider the case of the petitioner/appellant for bail. Sub-section (7) of Section 49 of the Act enables the Court to order release of a person on bail on being satisfied that there are grounds for believing that he is not guilty of committing such offence. In this case, we have sufficient materials on the basis of admitted documents for believing prima facie that the appellant might not have had the possession of the arms said to have been recovered from him in the light of the clear contradictions and the dispute as to the alleged recovery. Hence, we find no merit in the submission that the Court must wait for the trial. If really the recovery of a particular weapon was made, there could not have been a discrepancy of such a nature, which is vital and crucial.

17. For all the above reasons, we hold that there are prima facie grounds for believing that the appellant is not guilty of having committed the offence as alleged and therefore, he is entitled to be released on bail subject to the condition that he executes a personal bond for a sum of Rs.25,000/- (Rupees Twenty Five Thousand Only) with two sureties each for a likesum to the satisfaction of the learned Additional Chief Metropolitan Magistrate, Egmore and on a further condition that after his release, the appellant shall reside at Chennai and report before the said Magistrate everyday at 11 a.m.

18. In the result, the order of the Special Judge dated 4.8.2003 in Crl.M.P. No.52 of 2003 is hereby set aside and the appellant is directed

to be released on bail upon his satisfying the above said conditions. The criminal appeal is accordingly allowed. The observations made in this judgment shall, in no way, prejudice the trial of the case and the trial court shall proceed with the trial of the case, uninfluenced by any of the observations contained in this judgment.

Index : Yes
Internet : Yes

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To

1. The District Collector and
District Magistrate,
Chennai.

2. The Superintendent,
Central Prison, Chennai.

3. The Joint Secretary to Government,
Public (Law and Order),
Fort St. George,
Chennai-9.

4. The Public Prosecutor,
Chennai.

5. The Deputy Superintendent of Police,
C.B., C.I.D., Coimbatore.

6. The Special Judge,
Prevention Of Terrorism Act, 2002
Chennai at Poonamallee.

7. The Deputy Superintendent of Police,
C.B., C.I.D. Head Quarters, Chennai.